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No. 85-1835

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

CALIFORNIA,

Petitioner,

v.

PETER ROONEY,

Respondent.

On Writ of Certiorari to the
Court of Appeal of the State of California,
Second Appellate District, Division Seven

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether there can be reasonable expectation of privacy, for the purposes of the Fourth and Fourteenth Amendments, with respect to garbage placed in a communal trash bin of a multi-unit apartment building.

2. Whether there is an abandonment of property, for purposes of the Fourth and Fourteenth Amendments, when garbage is placed in a communal trash bin of a multi-unit apartment building.

3. Whether the Fourth and Fourteenth Amendments are violated when a police officer searches a communal trash bin of a multi-unit apartment building without a search warrant, probable cause, or consent.

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OPINION BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Seven is reported (as modified) as People v. Rooney, 175 Cal.App.3d 634, 221 Cal.Rptr. 49(1985). A copy of this opinion is set forth at pages 72-111 of the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeal of the State of California, Second Appellate District, Division Seven was filed on December 13, 1985, and the opinion was modified on December 19, 1985. (JA 72,110.) Timely petitions for rehearing were denied by the Court of Appeal on January 7, 1986. (JA 112.) Timely petitions for review were denied by the California Supreme Court on March 13, 1986. (JA 113.) Where the highest state court has jurisdiction to review a decision of a lower state court but refuses

to do so, the time for petitioning for a writ of certiorari runs from the date of the refusal to review. (American Railway Express Co. v. Levee 263 U.S. 19, 20-21 (1923). Our petition was filed on May 6, 1986, and was therefore timely. (Sup.Ct. Rule 20.1.) The petition was granted on October 14, 1986. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and

the persons or things to be seized." U.S. CONST. amend. IV.

"[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend. XIV, § 1.

The pertinent California constitutional provisions include:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." CAL. CONST. art I, § 13.

"Right to Truth-in Evidence. Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be

excluded in any criminal proceedings, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press."

CAL. CONST. art 28, subdivision (d).

Pertinent California statutory provisions include:

Penal Code Section 337a;

Penal Code Section 871.5;

Penal Code Section 1238;

Penal Code Section 1385;

Penal Code Section 1538.5.

STATEMENT OF THE CASE[1/]

I. History Of The Case

The instant case pertains to the legal sufficiency on its face of the affidavit in support of a search warrant and to the admissibility of evidence seized prior to the issuance of that warrant. The warrant (JA 7-12) authorized the search and seizure of evidence pertaining to bookmaking at apartment #8, 1120 North Flores Street, West Hollywood. The supporting affidavit (JA 13-28) contained an opinion of the affiant and his partner officer that a straight-in-back office bookmaking operation was conducted at the premises in question. (JA 26-27.)

We summarize the affidavit, in its salient aspects, as follows: A confidential informant informed Officer Ray E. Shorb, a police officer of the City of Los Angeles, the affiant, on December 3, 1983, "that Pete Rooney at telephone

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1. The Joint Appendix, the Clerk's Transcript, and the Reporter's Transcript on Appeal will be hereinafter respectively cited as "JA", "CT", and "RT".

number 213-656-8430 was accepting wagers on professional football events." The affiant confirmed "through Departmental sources" that the telephone number was listed to 1120 North Flores Street, apartment #8, West Hollywood, with Peter Ryan as subscriber. A record check disclosed that Peter Rooney had one prior bookmaking arrest, on September 11, 1978, at the same address. Officer Shorb obtained a bookmaking photograph of Peter Rooney. (JA 19-21.)

On December 15, 1983, Shorb and Les Wyeth, his partner officer, went to 1120 North Flores Street. They walked down the driveway to the apartment trash bin, approximately 8 feet long by 4 feet wide by 5 feet high, located in the subterranean garage of the apartment building.[2/]

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2. The Court of Appeal's opinion refers to the apartment building as having twenty-eight units. (JA 77.) However, neither the warrant nor affidavit specified the number of apartments in the building. It is described as simply being a "two story multi-unit building." (JA 9, 15.) The origin of the Court of Appeal's statement appears to have been a representation made by a deputy district attorney

There was trash spilling out of the bin onto the ground. The officers searched the bin and noticed that trash from numerous different apartments was co-mingled inside it. When they reached the bottom half of the bin, Shorb noticed a paper shopping bag with mail addressed to Pete Rooney, 1120 North Flores, #8, Los Angeles. Within this bag of trash, the officer discovered, inter alia, pieces of paper with sports wagers, pays and owes, and a tally sheet of wagers on different professional football teams. There was mail addressed to Pete Rooney but not to Peter Ryan in this bag. (JA 21-22.)

On December 16, 1983, Shorb observed a male caucasian, whom he recognized from the

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to the magistrate, which was not challenged by defense counsel. (CT 7.)

Although the affidavit does not expressly disclose whether the subterranean garage was open or not, "tested and interpreted in a commonsense and realistic fashion (United States v. Ventresca, 380 U.S. 102, 108(1965), the affidavit must be understood as indicating that the entry by the officers was into an open garage. Nowhere has respondent contended to the contrary. Indeed the Court of Appeal characterized the garage as "an area acessible to the public." (JA 80, 81.)

booking photograph to be Peter Rooney, drive into the subterranean garage at the apartment building in question and then enter apartment #8. (JA 22-23.)

Between December 30, 1983 and January 6, 1984, the officer dialed telephone number 213-656-8430 and overheard a telephone conversation between "a citizen informant and an unknown male." The informant asked the unknown male, "What's the latest line?"[3/] The unknown male returned with the latest line on the professional football games to be played. (JA 23-25.) Both Shorb and Wyeth had bookmaking expertise. (JA 23, 25-26.)

Having concluded that a bookmaking operation was being conducted at the premises in question, Officer Shorb obtained a search warrant on July 17, 1984 from Judge Nancy Brown, Municipal Court of Los Angeles Judicial District, authorizing search of Rooney's apartment.

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3. The term "latest line" means the point spread.

After the execution of the warrant, Rooney was charged in a felony complaint with having committed, on or about January 22, 1984: bookmaking (California Penal Code Section 337a,[4/] Subdivision 1) in count I; keeping a place with paraphernalia (id., Subdivision 2) in count II; recording wagers (id., Subdivision 4), in count III; permitting a place to be used for bookmaking purposes (id., Subdivision 5) in count IV; and accepting wagers (id., Subdivision 6) in count V. (JA 24-36.) Rooney moved that the magistrate quash the search warrant pursuant to Penal Code Section 1538.5.[5/] A hearing was held on said motion to quash and the magistrate dismissed the felony complaint on April 12, 1984, after the magistrate granted the motion to quash and the People represented that they would be unable to proceed. (CT 21.)

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4. For the pertinent portion of Section 337a, see APP-1.

5. For the pertinent portion of Section 1538.5, see APP-7.

The prosecution moved in the Superior Court that the felony complaint be reinstated pursuant to Penal Code Section 871.5.[6/] (CT 38-41.) On May 16, 1984, the Superior Court granted the People's motion to reinstate the felony complaint. Respondent then waived his right to a preliminary hearing. The parties stipulated that respondent be bound over to the Superior Court and that the information be deemed filed on that date with the same charges as in the felony complaint. Rooney was then arraigned and pleaded not guilty, and the cause was continued. (JA 37-39.)

On May 24, 1984, Rooney moved to suppress evidence pursuant to Penal Code Section 1538.5. (JA 40-45.) On June 6, 1984, a hearing was held in the Superior Court of Los Angeles County on said motion. After argument, that court granted the motion to suppress the evidence

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6. For the pertinent portion of the text of Section 871.5, see APP-4. Section 871.5 authorizes the Superior Court to review the dismissal of a felony complaint, or a portion thereof, by the magistrate.

recovered from the trash bin and that evidence seized pursuant to the warrant. After a representation that the People would be unable to proceed, the Superior Court dismissed the criminal action pursuant to Penal Code Section 1385.[7] (JA 46-48, 69-70.) The People appealed from that order as authorized by Penal Code Section 1238.[8]

The Court of Appeal of the State of California, Second Appellate District, Division Seven, reversed the order dismissing the criminal action against respondent in an opinion issued on December 13, 1985. (JA 72-112.) It ruled that the search warrant used to obtain evidence was supported by probable cause, but held that the incriminating items found in the trash bin belonging to the multi-unit apartment building in which respondent lived to have been seized in violation of the Fourth Amendment, prior to the issuance of the search warrant.

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7. For the text of Section 1385, see APP-6.

8. For the pertinent portion of the text fo Section 1238, see APP-6.

By virtue of the Court of Appeal's ruling, unless reversed by this Court, these incriminating items will therefore be inadmissible at the forthcoming trial of respondent.[9/]

II. Legal Background

In People v. Krivda, 5 Cal.3d 357, 95 Cal.Rptr. 62, 468 P.2d 689(1971), police officers observed the refuse collectors approaching defendants' premises (a single family dwelling), stopped the collectors about a half a block from the dwelling, identified themselves, requested them to empty the well of their trash truck, and to pick up the trash cans in front of defendants' premises on the parkway adjacent to the sidewalk. The California Supreme Court held that defendants had a reasonable expectation of privacy with respect to their trash contained in paper sacks located within the well of the refuse collectors' truck. That court

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9. See Penal Code Section 1538.5, division (c), reprinted at APP-7. Our argument that the suppression of the items found in the trash bin constitutes a final judgment, within the meaning of 28 U.S.C. § 1257, is set forth in pages 13-16 of our petition for writ of certiorari.

held that the warrantless search of the trash was unlawful because, although the trash was in the well of the truck, at no time did it lose its identity by being mixed and combined with the conglomeration of trash previously placed in the truck.

This Court granted certiorari with respect to Krivda in 1972 (405 U.S. 1039). Subsequently, however, the judgment of the California Supreme Court was vacated and that cause remanded to that court for appropriate clarification as this Court was unable to determine whether the California court had based its holding upon the Fourth and Fourteenth Amendments to the United States Constitution, or upon the equivalent California constitutional provision, or both. (California v. Krivda, 409 U.S. 33(1972). Thereafter, the California Supreme Court reissued its initial opinion pursuant to this Court' mandate for further proceedings (Krivda, 409 U.S. 33), and certified that it relied upon both the Fourth Amendment and the State Constitution. Accordingly, the latter's search-seizure

provision furnished an independent ground to support its holding. (People v. Krivda, 8 Cal.3d 623, 105 Cal.Rptr. 521, 504 P.2d 457(1973).)

In the instant case, the Court of Appeal held that the search of the communal trash bin violated the search-seizure provisions of both the Federal and California Constitutions. However the prosecution in the instant case began after June 9, 1982. Article I, Section 28, Subdivision (d) of the State Constitution[10/] abrogates a defendant's right to object to and suppress evidence seized in violation of the California, but not the federal Constitution (In re Lance W., 37 Cal3d 873, 210 Cal.Rptr. 631, 694 P.2d 744(1985)) with respect to prosecutions committed after June 9, 1982, the effective date of the adoption of Proposition 8. (People v. Smith, 34 Cal.3d 251, 193 Cal.Rptr. 692, 667 P.2d 149(1983).

The Court of Appeal noticed the applicability of the aborgation of the exclusionary

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10. The pertinent portion of Article I, Section 28 of the California Constitution is set forth supra, at 3.

rule based solely upon State constitutional grounds with respect to Rooney. (JA 91.) Hence the validity of the trash-bin search under the Federal Constitution is squarely before this

The Court of Appeal in the instant case upheld the validity of the warrant notwithstanding its conclusion that the trash bin search was invalid. However, the search warrant was issued in part because of the magistrate's reliance on the affiant's recitation of the facts pertaining to the trash bin search. No evidence was taken at the suppression hearing in the trial court. Thus, the Court of Appeal made its determination

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11. The Fourth Amendment is applicable to the States by virtue of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643(1961); Ker v. California, 374 U.S. 23(1963). Since the filing of our petition, the Court of Appeal of the State of California, Fourth District, Division Three, has also held that the Fourth Amendment prohibits the warrantless search of the contents of trash barrells set out for routine collection where, pursuant to the officer's request, the trash collector had cleaned his truck bin of other refuse, collected defendant's trash, and then gave it to the officer for searching. People v. Greenwood, 182 Cal.App.3d 729, 227 Cal.Rptr. 539(1986). The California Supreme Court denied the People's petition for review on August 28, 1986.

that the trash bin search was invalid based upon its reading of the affidavit in support of the warrant. Hence in evaluating the contents of the affidavit, we proceed with our legal analysis aware that the affidavit is not to be interpreted "in a hypertechnical, rather than a commonsense, manner." (United States v. Ventresca, 386 U.S. at 109.) Moreover, "after-the-fact scrutiny by courts of the sufficiency of an affidavit should not take the form of de novo review." (Illinois v. Gates, 462 US. 213, 236(1983).) Finally, "[a] deferential standard of review is appropriate to further the Fourth Amendment's strong preference for searches conducted pursuant to a warrant." (Massachusetss v. Upton, 466 U.S. 727(1984).)

SUMMARY OF ARGUMENT

The Fourth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." (Emphasis added.) The search (in the popular sense of the term) of the trash bin did not pertain to Rooney's Fourth Amendment interest in the security of his person. Nor did it pertain to Rooney's interest in the security of whatever is denoted by the term "houses," as used in the Fourth Amendment, since the subterranean garage was not part of his residence or within its curtilage.[12/] Moreover, the search of the communal trash bin did not pertain to Rooney's papers and effects, within the meaning of the Fourth Amendment, because, as

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12. Even were the subterranean garage deemed to have been within the curtilage of Rooney's home, he would not have had a reasonable expectation with respect to it because it was open to the public.

we contend, his garbage[13] when placed in the communal trash bin ceased to be his papers and effects in the sense demanded by the Fourth Amendment, however factually justified his expectation that police officers would not rummage through the contents of the trash bin. For people to have a per se[14] reasonable expectation of privacy with respect to trash, it is a necessary (but not sufficient) condition for that trash to be their papers and effects, within the sense of the Fourth Amendment. On the other hand, trash may be someone's papers and effects, within the sense of the Fourth Amendment, and yet there may not be a legitimate or reasonable expectation of privacy with respect to it because of some other reason.

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13. For purposes of this brief, we shall interchangeably use of terms "trash," "garbage," and "refuse," unless otherwise indicated.

14. We say "per se" to indicate a reasonable expectation of privacy that exists as to an object for a reason other than because it is within someone's house as to which there is a comprehensive expectation of privacy.

It is axiomatic that no person can have a per se Fourth Amendment interest with respect to property abandoned by him, in some particular sense of the term "abandoned." It is generally agreed that the test of whether property is abandoned for Fourth Amendment purposes is not to be determined simply by the application of ordinary property law rules of the jurisdiction in question. It is urged by some that the test of whether an object is abandoned for Fourth Amendment purposes is whether there is no longer a reasonable expectation of privacy with respect to it. However, the term "reasonable" expectation of privacy," as used by this Court in connection with the Fourth Amendment, is a technical term of art. Rather, the appropriate test of abandonment is whether the person, whose effect an object has been, has by some act relinquished so much of his possessory or quasi-possessory interest in it that it can no longer be deemed to be his effect, within the meaning of the Fourth Amendment, without,

however, vesting sufficient possessory or quasi-possessory interests in another person with respect to the object such as to constitute that object the effect of that person in the requisite sense.[15]

The Fourth Amendment protects only those interests it secures against unreasonable invasions of legitimate expectations of privacy. Hence it is misleading, when speaking of the Fourth Amendment, to say that someone has a per se legitimate expectation of privacy as to an object unless it is his or her paper or effect, within the meaning of the Fourth Amendment, as determined independently of that expectation of privacy. When a person terminates so much of his possessory of quasi-possessory interest in an object, without

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15. It is necessary to include this, or some similar proviso, in order to prevent the gift of some property from being deemed abandoned, since the test otherwise would entail too radical a departure from any of the more usual senses of the term. Of course, by the acceptance of a gift, an object also ceases to be the effect of the donor and becomes the effect of the donee.

destroying it, such that it ceases to be his paper or effect in the constitutional sense, without it becoming the paper or effect of another, he is then said to have abandoned it. This act of abandonment ipso facto terminates whatever per se, Fourth Amendment protected reasonable expectation of privacy the actor had previously had with respect to it.

Assuming arguendo that a person so acts so as to significantly diminish the quality and quantity of his possessory or quasi-possessory interest in an object without, however, terminating its status as his or her paper or chattel (in the constitutional sense), the act may nevertheless be sufficient, in the light of surrounding circumstances, to terminate whatever reasonable expectation of privacy he once had with respect to the object in question.

It is submitted that the act of placing garbage in the communal trash bin located in the subterranean garage of a multi-unit apartment building constitutes the abandonment of

that garbage. That is, the placing of the garbage under the circumstances terminates its status as any person's papers or effects in the sense required by the Fourth Amendment. Hence there can be no legitimate expectation of privacy, under the Fourth Amendment, with respect to such garbage.

Alternatively, it is submitted that if the act of placing garbage in the communal trash bin, located in the subterranean garage, of a multi-unit apartment building does not constitute the abandonment of said garbage, the act nevertheless terminates whatever per se reasonable expectation of privacy which had existed with respect to that garbage.

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I.

FOURTH AMENDMENT-ROOTED REASONABLE EXPECTATIONS OF PRIVACY MUST PERTAIN ONLY TO INTERESTS PROTECTED BY THE FOURTH AMENDMENT

This Court declared in Katz v. United States, 389 U.S. 347, 351(1967) that the "Fourth Amendment protects people, not places." However, this Court has explained in Oliver v. United States, 466 U.S. 170, 176 n. 6(1984) that:

> This Court frequently has relied on the explicit language of the Fourth Amendment as delineating the scope of its affirmative protections. See, e.g., Robbins v. California, 453 U.S. 420(1981) (opinion of Stewart, J.); Payton v. New York, 445 U.S. 573, 589-590(1980); Alderman v. United States, 394 U.S. 165, 178-180(1969). As these cases, decided after Katz indicate, Katz' "reasonable expec-

tation of privacy" standard did not sever Fourth Amendment's doctrine from the Amendment's language. Katz itself construed the Amendment's protection of the person against unreasonable searches to encompass electronic eavesdropping of telephone conversations sought to be kept private; and Katz' fundamental recognition that "the Fourth Amendment protects people - and not simple 'areas' - against unreasonable searches and seizures," see 389 U.S., at 353, is faithful to the Amendment's language. As Katz demonstrates, the Court fairly may respect the constraints of the Constitution's language without wedding itself to an unreasoning literalism. In contrast, the dissent's approach would ignore the language of the Constitution itself as well as overturn this Court's governing precedent.

Hence it is the Fourth Amendment's securing of the people against unreasonable searches as to their persons against unreasonable searches and seizures which generates the doctrine that the police may not electronically eavesdrop without a warrant on a conversation conducted in a telephone booth. Clearly, the search (in the popular sense) of the communal trash bin in Rooney's apartment building does not involve any rationally conceivable issue relating to the protection of the Fourth Amendment of Rooney's person against unreasonable searches and seizures.

It is also clear that this search (in the popular sense) of the trash bin did not infringe upon Fourth Amendment interest pertaining to whatever is denoted by the term "houses." In the first place, in no meaningful way can it be said that the subterranean garage was a part of Rooney's house, within the meaning of the Fourth Amendment, or within the curtilage of his residence. This Court has declared in Oliver, 466 U.S. at 180:

> At common law, the curtilage is the area to which extends the intimate activity associated with the "sanctity of a man's home and the privacies of life," Boyd v. United States, 116 U.S. 616, 630(1886), and therefore has been considered part of the home itself for Fourth Amendment purposes. Thus, courts have extended Fourth Amendment protection to the curtilage; and they have defined the curtilage, as did the common law, by reference to the factors which determine whether an individual reasonably may expect that an area immediately adjacent to the home will remain private.

This Court further noted in California v. Ciraolo, 476 U.S. _____ [106 S.Ct. 1809, 1812 (1986) that "[t]he protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically

and psychologically, where privacy expectations are most heightened."

The subterranean garage, which Rooney shared with the other tenants of the multi-unit apartment complex, was not within the curtilage of his residence. Rooney's apartment was located on the second story, on the northwest end of the apartment building, and thus was not immediately adjacent to the subterranean garage, at the southeast end. (JA 15, 21.) Even if this garage were not accessible to the public, it cannot be rationally deemed to be "an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened."

As one State court has stated: "In a modern urban multifamily apartment house, the area within the 'curtilage' is necessarily much more limited than in the case of a rural dwelling subject to one owner's control."[16/]

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16. Commonwealth v. Thomas, 358 Mass.

For this reason, it has been held that an underground common garage of a multi-unit apartment house does not constitute part of the curtilage of a tenant. (United States v. Cruz Pagan, 537 F.2d 554, 558(1st Cir. 1976). See United States v. Stanley, 597 F.2d 866, 870(4th Cir. 1979), holding that the curtilage of an occupant of a mobile home within mobile home park did not include the common area parking lot in which occupant's automobile was parked since his parking space was not annexed to his house or within the general enclosure surrounding his home.) It is of interest that the Court of Appeal in the instant case rejected respondent's contention that the underground garage was within the curtilage of his home.[17] (JA 96-97.)

771, 267 N.E.2d 489, 491(1971) (holding that the cellar of a six-unit apartment building in which tenants had access for washing and other purposes was not within the curtilage of a third story apartment tenant).

17. Some cases have held (without discussing the curtilage issue) that an apartment tenant does not have a reasonable

The Fourth Amendment also secures the right of the people against unreasonable searches and seizures of their papers and effects. The contents of the garbage bag, which contained the papers seized by the officers in the instant case, had been Rooney's papers and effects at one time. However, the critical issue is whether the garbage bag

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expectation of privacy with respect to the underground garage or the basement of the apartment building open to the tenants for various domestic purposes. (See, e.g., United States v. Penco, 612 F.2d 19, 24-25(2d Cir. 1979); United States v. McGrane, 746 F.2d 632, 635(8th Cir. 1984). The California Supreme Court has also held, in People v. Terry, 70 Cal.2d 410, 77 Cal.Rptr. 460, 454 P.2d 36, 47-48(1969), cert. denied, 399 U.S. 911(1970), that the defendant's constitutional right of privacy was not violated when officers entered an apartment house garage, used in common by tenants of the apartment building, and saw in plain sight marijuana on an open ashtray inside the defendant's car. In the instant case, the affidavit read in a commonsense manner indicates that the officers peaceably entered the open underground garage. See supra, at 6, n. 2. However, our argument that Rooney's curtilage did not include the undergound garage of the apartment building is not to be taken as implying that the curtilage of an apartment dweller does not encompass common hallways or other spaces immediately adjacent to his apartment. But, it is not necessary to discuss this subject in this case.

contained Rooney's papers and effects at the time of the officers' examination of the contents of the trash bin. We urge that the legitimate expectation of privacy which the Fourth Amendment protects necessarily pertains only to people with respect to their persons, houses, papers, and effects. A consideration of Oliver v. United States with its discussion of the open fields doctrine, will be helpful in this connection.

In Oliver, this Court considered the viability of the open fields doctrine first enunciated in Hester v. United States, 265 U.S. 57(1924). The Court first noted that "[t]he rule announced in Hester v. United States was founded upon the explicit language of the Fourth Amendment [and t]hat Amendment indicates with some precision the places and things encompassed by its protections." (Oliver, 466 U.S. at 176.) This Court concluded, independently of the reasonable expectation of privacy doctrine, "that the government's intrusion upon the open fields

is not one of those 'unreasonable searches' proscribed by the text of the Fourth Amendment," having rejected the notion that open fields are either houses or effects, within the meaning of the Fourth Amendment. (Id. at 177.)

After having already concluded that the open fields doctrine is still valid, this Court proceeded to examine whether it is also consistent with the reasonable expectation of privacy doctrine. After an extended analysis, this Court concluded that "an individual has no legitimate expectation that open fields will remain free from warrantless intrusion by government officers." (Id. at 181.) What is of special significance is that this Court then immediately proceeded to consider the contention "that the circumstances of a search sometimes may indicate that reasonable expectations of privacy were violated; and that courts therefore should analyze these circumstances on a case-by-case basis." (Ibid.) This contention was rejected with the terse

statement: "The language of the Fourth Amendment itself answers [this] contention."[18] (Ibid.) This statement is pointless unless it means that the short answer to the contention in question is that open fields are neither houses nor effects within the meaning of the Fourth Amendment. In this connection, we note Mr. Justice White's brief concurring opinion in which he stated: "[T]here is no need to go further and deal with the expectation of privacy matter. However reasonable a land owner's expectation of privacy may be, those expectations cannot convert a field into a 'house' or an 'effect.'" (Id. at 184.)

From the foregoing, we conclude that it would be putting the proverbial cart before the horse were the reasonable expectation of privacy doctrine to be used to determine whether the houses, papers, and effects of

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18. The Court then proceeded to show why a case-by-case approach does not provide "a workable accomodation between the needs of law enforcement and the interests protected by the Fourth Amendment." (Id. at 181.)

some particular person or persons are "houses," "papers," and "effects" within the meaning of the Fourth Amendment.[19]

Suppose, for example, that A sets out an inoperable radio and a sealed trash bag containing pictures for collection at the curb in front of his residence. Using the reasonable expectation of privacy doctrine as the means to determine whether the inoperable radio and the sealed trash bag are A's effects within the meaning of the Fourth Amendment would result in the following: it would be certain that the radio was no longer A's effect, but it might be at least arguable that the contents of the trash bag remained A's effects. Certainly A has no reasonable expectation of privacy as to the radio; but it might be arguable that he has that

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19. The Court noted that "the term 'effects' is less inclusive than 'property,'" and that the "Framers would have understood the term 'effects' to be limited to personal, rather than real, property." (Oliver, 466 U.S. at 177.)

expectation with respect to the contents of the bag. However, it makes more sense to say that both the radio and the bag with its contents remain (or do not remain) the effects of A, in the constitutional sense.

Moreover, this Court presently defines search as being an intrusion of a reasonable expectation of privacy. (United States v. Jacobson, 466 U.S. 109, 113(1984).) Consider then the language of the Fourth Amendment in that it secures the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. If the reasonable expectation of privacy doctrine is used to determine whether a certain object is A's effect and the conclusion is that A has a reasonable expectation of privacy with respect to that object, it follows that A has the Fourth Amendment right to be secure in this object because he has a reasonable expectation of privacy against a search, which in turn is defined as an intrusion of the reasonable expectation

of privacy. There appears to be some redundancy here.

It might well be objected that, as this Court declared in Katz, that "The Fourth Amendment protects people - and not simple 'areas' - against unreasonable searches and seizures." (389 U.S. at 353.) Therefore, it might be urged, whether or not an object is someone's effect to be considered as per se protected by the Fourth Amendment, that Amendment nevertheless protects people with respect to any object of a legitimate expectation of privacy. In the first place, the Fourth Amendment protects people in their persons, houses, papers and effects. Katz can be misread, but the fault is that of the reader, and not of the Court. Thus, for example, this Court has declared: "The simple language of the Amendment applies equally to seizures of persons and to seizures of property." (Payton v. New York, 445 U.S. 573, 585(1980).) The opinions of this Court are thankfully free of indications that the expression "reasonable

expectation of privacy" is to serve as just as much "a talismanic solution to every Fourth Amendment problem" as the expression "constitutionally protected areas." (Katz, supra, at 351 n. 9.)

The Court is quite right in rejecting the notion that it is appropriate "to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical." (Jones v. United States, 362 U.S. 257, 266(1960).) But surely people must have sufficient possessory or quasi-possessory interests with respect to houses, papers, and effects in order to meaningfully say that these are their houses, papers, and effects, within the meaning of the Fourth Amendment. Once having determined that a person has sufficient possessory or quasi-possessory

interests in an object such that it can be meaningfully said that it is his effect, within the meaning of the Fourth Amendment, it only then becomes appropriate to consider whether he has, under the circumstances, a reasonable or legitimate expectation of privacy with respect to it grounded upon Fourth Amendment values. Thus, for example, in Rawlings v. Kentucky, 448 U.S. 98(1980), this Court rightfully held that Rawlings did not have a legitimate expectation of privacy with respect to his drugs found in Cox's purse. According to our analysis, the drugs that were placed in Cox's purse remained Rawlings' effects; but he did not have a sufficient possessorial or quasi-possessorial interest in Cox's purse to meaningfully say that it was his purse as well as that of Cox. Rawlings could not have a legitimate expectation of privacy as to the drugs within Cox's purse simply because they were not within a closed container provided by him and by which

his privacy interest could be manifested.[20] If, on the other hand, it is urged that the test by which we determine whether Rawlings' drugs were his effects when placed in Cox's purse is by the use of the reasonable expectation of privacy doctrine, it follows, given the ultimate result in Rawlings, that he, Rawlings, had no reasonable expectation of privacy as to the drugs in Cox's purse, because these drugs ceased to be his effects, within the meaning of the Fourth Amendment, when he placed them in Cox's purse. This, it

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20. By way of contrast, compare: Jones v. United States, where the defendant was arrested in an apartment which belonged to a friend, who had given him the use of it, and a key, that he paid nothing for the use of the apartment, and that the friend was away for about five days; United States v. Jeffers, 342 U.S. 48(1951), where police unlawfully searched a hotel room rented by defendant's two aunts, but who had given him a key and had given their permission for him to use for room at will, and that he often entered the room for various purposes. As this Court explained in Rakas v. Illinois, 439 U.S. 128, 143 n. 12(1978): "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude [others]."

respectfully submitted, is nonsense-on-stilts since it may be presumed that Rawlings intended that they be returned by Cox to him at some convenient time at his request.

II.

RESPONDENT LOST HIS FOURTH AMENDMENT INTEREST IN HIS GARBAGE BECAUSE HE ABANDONED IT BY PLACING IT IN THE COMMUNAL TRASH BIN

It must be taken as certain that a person loses his Fourth Amendment interest in his papers and effects when he has abandoned them. (Hester v. United States, 265 U.S. at 58; Abel v. United States, 362 U.S. 217, 224-225, 240-241(1960); Rios v. United States, 364 U.S. 253, 254, 252 n. 6(1960).) Obviously, the term "abandoned" must be understood in an appropriate sense. The question is what is this appropriate sense.

A number of federal and state cases have stated or intimated that the appropriate test of abandonment, for Fourth Amendment purposes, is grounded upon the reasonable expectation of

privacy doctrine.[21] This is quite understandable since virtually all the courts deciding these cases found themselves under the

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21. See, e.g., United States v. Biondich, 652 F.2d 743, 745(8th Cir.1981), cert. denied, 454 U.S. 975(1981); United States v. Colbert, 474 F.2d 174, 176(5th Cir.1973); United States v. Crowell, 586 F.2d 1020, 1025(4th Cir.1978), cert denied, 440 U.S. 959(1979); United States v. Hershenow, 680 F.2d 847, 856(1st Cir.1982); United States v. Jackson, 448 F.2d 963, 971 (9th Cir.1971), cert denied, 405 U.S. 924 (1972); United States v. Katsaris, 684 F.2d 758, 761(11th Cir.1982); United States v. Michaels, 726 F.2d 1307, 1312(8th Cir.1984), cert. denied, 469 U.S. 820(1984); United States v. Reicherter, 647 F.2d 397, 399(3rd Cir.1981); United States v. Shelby, 573 F.2d 971, 973(7th Cir.1978), cert. denied, 439 U.S. 841(1978); United States v. Vahalik, 606 F.2d 99, 101(5th Cir.1979), cert. denied, 444 U.S. 1081(1980). For some state cases, see, e.g., Commonwealth v. Cihylik, 337 Pa.Super. 221, 486 A.2d 987, 990(1985); Croker v. State, 477 P.2d 122, 125(Wyo. 1970); People v. Collins, 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267, 279(1985), cert. denied, _____ U.S. _____ [106 S.Ct. 267(1985); People v. Krivda, 5 Cal. 3d at 364-365, 486 P.2d at 1267; State v. Brown, 20 Ohil. App.3d 36, 484 N.E.2d 215, 218(1984); State v. Fassler, 108 Ariz. 586, 503 P.2d 807, 814(1972); State v. Oquist, 327 N.W.2d 587, 590 (Minn. 1982); Smith v. State, 510 P.2d 793, 797(Alaska 1973); State v. Schultz, 388 So.2d 1326, 1327(Fla.Dist.Ct.App. 1980); State v. Stevens, 123 Wis.2d 303, 367 N.W.2d 788, 795(1985), cert. denied, _____ U.S. _____ [106 S.Ct. 151(1985); Venner v. State, 279 Md. 47, 367 A.2d 949, 952(1977), cert. denied, 431 U.S. 932(1977)

compulsion of Katz and its progency, which appeared to indicate that the determination whether a person had a Fourth Amendment interest was exclusively controlled by whether or not he had a reasonable expectation of privacy. However, as we have seen, this Court in Oliver has clearly signaled that the reasonable expectation of privacy doctrine is not without limitation, and that that limitation is provided by the Fourth Amendment itself, which secures the people against unreasonable searches and seizures only with respect to whatever are denoted by the terms "persons," "houses," "papers," and "effects," as used in that Amendment.

As we have already argued, a person cannot have a Fourth Amendment rooted legitimate expectation of privacy except as to an interest secured by that Amendment. Therefore, the appropriate test for abandonment cannot be by virtue of the application of the legitimate expectation of privacy doctrine since otherwise the application of that doctrine provides

the means by which the interests secured by that Amendment are to be identified.

The proper application of the legitimate expectation of privacy doctrine is to be presently understood as presupposing that the person complaining of a Fourth Amendment violation has an interest secured by that Amendment at issue. It behooves us to now look at those few cases decided by this Court which involve abandonment.

In Hester v. United States, this Court held that revenue officers without violating the Fourth Amendment, entered upon the open fields near the house of Hester's father. After an alarm was given, one officer pursued Hester and one Henderson, and fired his pistol. Hester dropped the jug he had been carrying, and it broke. Henderson threw away the bottle which Hester had been seen by the officers to have previously given him. The jug and bottle both contained what the officers recognized as moonshine whisky. Another jar, found outside the house and that had been thrown out

and broken, also contained whiskey. This Court concluded: "The defendant's own acts, and those of his associates, disclosed the jug, the jar, and the bottle; and there was no seizure in the sense of the law when the officers examined the contents of each after it had been abandoned." (265 U.S. at 58.) Although, given the open fields doctrine, no reasonable expectation of privacy was violated, Hester is of significance to us as indicating that the jug, the jar, and the bottle were deemed abandoned by this Court albeit that these items were discarded by Hester and his associates on the real property belonging, presumably, to Hester's father. Therefore, it must be concluded that whatever possessory or quasi-possessory interests Hester and his associates respectively had in these items, prior to having been thrown away, which constituted them as the effects of these men (within the meaning of the Fourth Amendment), were terminated when the items were thrown away by them.

In Abel v. United States, the relevant facts are as follows: After Abel checked out of the hotel, an F.B.I. agent, securing the hotel management's permission to search the room just vacated by Abel, conducted a search of that room. Among other things, he seized the contents of the wastepaper basket. This Court characterized the search of the wastepaper basket and the seizure of its contents as follows (362 U.S. at 241):

> [A]t the time of the search petitioner had vacated the room. The hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made. Nor was it unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned,

they were bona vacantia. There can be nothing unlawful in the Government's appropriation of such abandoned property.

By way of contrast, this Court declared in Rios v. United States, 364 U.S. at 262 n. 6: "A passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have 'abandoned' it. An occupied taxicab is not to be compared to an open field, Hester v. United States, 265 U.S. 57, or a vacated hotel room, Abel v. United States, 362 U.S. 217."

Since these cases, this Court has provided virtually no explicit guidance with respect to the concept of abandonment for Fourth Amendment purposes.

Because the critical issue is whether Rooney's Fourth Amendment interest has been violated by the examination of the trash bin in his apartment building garage, resolution of that issue must ultimately depend upon whether his garbage (in the sense that the

garbage came from him) were his effects (in the sense of the Fourth Amendment) at the time the officers examined the contents of the trash bin. Hence one prong of the test as to whether a person has abandoned an object for Fourth Amendment purposes is whether that possessory or quasi-possessory interest which he had with respect to the object in question and by virtue of which was effect (for Fourth Amendment purposes) was terminated by some action on his part or on his behalf. On the other hand, a person also terminates his Fourth Amendment interest in some object when it is actually accepted as a gift by another person. Hence, essential to the notion of abandonment is that no other person has acquired the object as his effect for Fourth Amendment purposes). When a person, for example, throws away an object with the requisite intent, thereby terminating its status as his effect (for Fourth Amendment purposes), it does not <u>ipso facto</u> become the effect of the owner of the land upon which the object lands

merely because, as a matter of the property law of the jurisdiction in question, the land owner acquires title and the right of possession to the discarded object. In the instant case, Rooney's garbage was placed in the communal trash bin with a state of mind so that the garbage ceased to be Rooney's effects (for Fourth Amendment purposes). But we would also urge that it did not become ipso facto the effects (for Fourth Amendment purposes) of the owner or manager of the apartment house. Hence, we submit, that the garbage was abandoned when it was placed in the communal trash gin, albeit the trash bin itself was the effect (in the constitutional sense) of the apartment house owner and/or manager. Similarly, to assert that a person abandons his garbage whenever he puts it out at the curb for collection in a public place or a place open to the public, implies that such garbage on the curb is no person's effect (for Fourth Amendment purposes) for the time being.

When a person discards trash, such that it ceases to be his effect (for Fourth Amendment purposes), it may well be the case that, in a given situation, he may have a well justified belief that police will not, in all probability, examine the trash. He may also expect that in the ordinary course of events the trash will be picked up by authorized trash collectors, who will take the trash and dispose of it without examining it. He may even discard the trash with the state-of-mind such that he would not have done so were there any substantial probability that police would examine his trash. Nevertheless, when a person discards trash with the present intention of not retrieving it and sets it out for collection, or deposits it outside his home and its curtilage, such trash must be taken as having ceased to be his effects (for Fourth Amendment purposes). Because the trash has ceased to be his effects, he cannot be deemed to have any <u>per se</u> legitimate expectation with respect to it.

Our analysis is supported by a signficant number of cases, which include:

In Magda v. Benson, 536 F.2d 111(6th Cir. 1976), the court held that garbage placed for collection on a treelawn next to a street "is abandoned and no longer protected by the Fourth Amendment." (Id. at 112.) Moreover, "no legitimate expectation of privacy exists as to abandoned property." (Id. at 113.)

In United States v. Alden, 576 F.2d 772 (8th Cir.1978), cert denied, 439 U.S. 855(1978) the court declared: "Because no one owns or possesses abandoned property, no one can claim a Fourth Amendment interest in it." (Id. at 777.) The court explained: "The very notion of abandonment, however, implies a renunciation of any reasonable expectation of privacy."22/

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22. In this case, items found by police near or in a pile of partially burned trash, apparently within the curtilage of appellant's residence, was considered by the trial court as abandoned since the seized items had been placed in the trash pile for burning or other disposal, and there was no evidence of an intent to retain anything in the pile. The appellate court declared: "On these facts, we

The court in United States v. Dzialak, 441 F.2d 212(2d Cir.1971), cert. denied, 404 U.S. 883(1971), declared (with respect to a cardboard box, and its contents, set out as trash between the sidewalk and street in front of appellant's home): "[W]e think it abundantly clear that Dzialak abandoned the property. The town ordinance [which prohibited anyone except authorized municipal authorities to rummage into, pick up, collect, move or otherwise interfere with articles or materials placed on the right of way of any public street for collection] simply cannot change the fact that he 'threw [these articles] away' and thus there 'can be nothing unlawful in the Government's appropriation of such abandoned property.'" (Id. at 215.)

In United States v. Kramer, 711 F.2d 789 (7th Cir.1983), the court declared: "the special protection the Fourth Amendment

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cannot say that the district court's finding of abandonment was clearly erroneous." (Ibid.)

accords people in 'their persons, houses, papers, and effects' does not extend to their discarded garbage," placed by defendant by the roadside in front of his house to be collected by a private garbage removal service. (Id. at 792.) Although this court also contained a reasonable-expectation-of-privacy analysis, it also observed that "[f]or present purposes, an expectation of privacy is simply an interest protected by the Fourth Amendment." (Id. at 793.)

The court in United States v. Mustone, 469 F.2d 970(1st Cir.1972) held that a defendant abandoned two trash bags when he deposited them on the sidewalk near some garbage cans several doors away from the storefront office from which he had emerged. The court declared: "Implicit in the concept of abandonment is a renunciation of any 'reasonable' expectation of privacy in the property abandoned. The contrary suggestion strikes us as anomalous." (Id. at 972.)

Another pertinent case is People v. Huddleston, 38 Ill.App.3d 277, 347 N.Ed.2d 76 (1976), which held that defendant abandoned his trash, contained in two plastic bags, when he deposited them at the curbside in front of his residence for pickup collection, "in the sense that he demonstrated an unequivocal intention to part with it forever." (Id. at 80.) Accordingly, "[a] person who abandons property no longer has a 'reasonable expectation' of freedom from governmental intrusion into the area, or from governmental appropriation of the abandoned property." (Ibid.)

Even some courts which maintain that the controlling test of whether a person's Fourth Amendment right has been violated with respect to discarded garbage is to be independently determined by the reasonable expectation of privacy doctrine, under compulsion of Katz as understood by them, make it clear (to quote from one opinion) that "the sequence of an individual's placing an article in a receptacle, from which routine municipal collections

are made, and then withdrawing from the area [is] activity clearly indicative of 'an intention to relinquish all title, possession, or claim to property,'" and hence an abandonment. (Smith v. State, 510 P.2d 793, 796 (Alaska 1973). See also State v. Oquist, 327 N.W.2d at 590; United States v. Kahan, 350 F.Supp. 784, 795-796(S.D.N.Y. 1972), reversed on other grounds, 479 F.2d 290(2d Cir. 1973), reversed with directions to reinstate the district court judgment, 415 U.S. 239 (1974).)

We respectfully submit that the rule that should be authoritatively adopted by this Court is that an object is abandoned when it is discarded, thrown away, or otherwise disposed of under circumstances which demonstrate the "unequivocal intention to part with it forever," but before another person can be meaningfully said to have acquired the trash.

It is contended by some, for example, by the California Supreme Court in Krivda, 5 Cal. 3d at 366, 486 P.2d at 1268, that a partial

abandonment is insufficient, that "[t]he placement of one's trash barrels onto the sidewalk for collection is not, however, necessarily an abandonment of one's trash to the police or general public." Of course, the definition of "abandonment" within the law of a particular jurisdiction may be such that no object is deemed abandoned unless accompanied by an indifference as to who thereafter acquires the object. Nevertheless, a person who discards, throws away, or otherwise disposes of an object with an intent to forever part with it and who desires or expects that it will be acquired by a particular person, and no other, is in a position functionally equivalent to that of a person who discards, throws away, or otherwise disposes of an object with an intent to forever part with it and who is indifferent as to who thereafter acquires the object. In either case, there is an effective loss of possessory or quasi-possessory control.

The case of a so-called partial abandonment is very similar to those instances where

a person delivers an object to another with instructions to the recipient to destroy or discard the same. For example, in Commonwealth v. Richardson, 476 Pa. 571, 383 A.2d 510(1978), cert. denied, 436 U.S. 910(1978), defendant gave an earring to another person with the instruction to flush it down the toilet. The Pennsylvania Supreme Court declared that defendant "relinquished or abandoned" the earring. The court concluded that defendant "had relinquished any possessory interest in the property in question and therefore his Fourth Amendment rights were in no way violated by the seizure of these items." (Id. at 517.) Similar cases include United States v. Cella, 568 F.2d 1266(9th Cir.1977), where negatives and pasteups of incriminating invoices given by accused tax evaders to an employee with orders to destroy them were deemed to have been abandoned. In United States ex rel. Fein v. Deegan, 298 F.Supp. 359 (S.D.N.Y. 1967), aff'd 410 F.2d 13(2d Cir.1969), cert. denied 395 U.S. 935(1969), the court

considered a situation where the petitioner told his friend, Gloria, to "[g]et rid of all the furniture, and get rid of the rug; get rid of everything' in his apartment the day of the murder of which he stood convicted. He was insistent that she quickly dispose of all the furniture, and when she was proceeding too slowly he said, apparently to prod her, "Just get rid of it. I don't care what you do with it." The friend disposed of the rug and a television set, and stored the rest of the furniture in a warehouse. The court stated "[i]t appears abundantly clear that the last thing petitioner wanted was a possessory interest in these articles, or any connection with them," and that he "had abandoned the property, as much as if he had thrown it into a public wastepaper basket." (Id. at 365.) Although, according to our proposed definition, an abandonment did not take place because the furniture became Gloria's effects, this case, as well as the two cases just discussed, indicate that when A gives an article to B with

instructions to destroy or otherwise discard it, this bailment is insufficient to preserve that possessory or quasi-possessory interest in the article such that it remains A's effect, within the meaning of the Fourth Amendment. A bailment for destruction, if you please, is quite different from a bailment for storage or for delivery to another person. The person who provides the article for storage or for delivery to another retains a sufficient possessory or quasi-possessory interest in the article such that it continues its status as his effect (for Fourth Amendment purposes), although it also becomes the effect of the bailee. Whether or not, however, the bailor and/or bailee has a legitimate expectation of privacy will depend upon the circumstances, including, for example, whether the article is within a closed container.[23/]

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23. See United States v. Jacobson, 466 U.S. at 120 n. 17: "a container which can support a reasonable expectation of privacy may not be searched, even on probable cause, without a warrant."

Hence trash placed for collection outside the curtilage of his residence, with the intent that only the trash collector take possession of it and that no person examine it, becomes the subject of a bailment for destruction once the collector acquires it. But until the collector acquires the trash, it is no one's effect within the meaning of the Fourth Amendment. Once the collector acquires the trash, it may be said to become the collector's effect (assuming arguendo that the trash can becomes an effect in the constitutional sense since the collector possesses it only with the intent to discard it), but it does not somehow also become again the effect (for Fourth Amendment purposes) of its former owner. On the other hand, when a person, instead of depositing trash for collection at the curb in front of his residence, directly delivers the trash to the trash collector, there has been no abandonment (as we have defined it). However, there is now a bailment for destruction. Upon delivery of the trash to the bailee, it

has ceased to be the effect of the bailor even though, as a matter of state law, he may continue to have some property interest in the trash.

The mere fact that trash is within a closed container does not vest it with a constitutionally protected status. This is surely the case where the container, such as an ordinary plastic bag, is itself intended to be discarded and is a constituent part, therefore, of trash.[24]

On the other hand, the homeowner does not intend that the trash collector take the metal or plastic garbage can. Whether or not covered, a permanent trash can cannot be a container which supports a reasonable expectation of privacy given that trash deposited for collection or placed in a communal trash bin has ceased to be anyone's effect for Fourth

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24. See Texas v. Brown, 460 U.S. 730 (1983), in which it was held that seizure of a balloon reasonably suspected of containing an illicit substance did not violate the Fourth Amendment under the plain view doctrine.

Amendment purposes. (See United States v. Jacobson, 466 U.S. at 120 n. 17.) Moreover, the closed permanent trash container, sitting out on the street awaiting the arrival of the trash collector, or sitting in the common subterranean garage of an apartment house, falls within the class of those "containers (for example a kit of burglar tools or a gun case) [which] by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance." (Arkansas v. Sanders, 442 U.S. 753, 764 n. 13(1979).) As to such containers, a warrantless search is not in violation of the Fourth Amendment since there is no Fourth Amendment interest in their contents. (United States v. Ross, 456 U.S. 798, 814 n. 19(1982); Texas v. Brown, 460 U.S. at 750-751 (Stevens, J., concurring).)

It is not our intent to question the proposition that there is a Fourth Amendment interest with respect to trash within houses (as that term is used in the Amendment),

including the curtilages of private residences. In the first place, in many cases the mere deposit of trash into a wastepaper basket, or other trash container, within the home or an office, may not, under the circumstances, demonstrate an unequivocal present intend to forever terminate one's possessory or quasi-possessory interest in the trash. Unlike the deposit at the curb of trash for collection, there are many instances where the deposit of trash in a wastepaper basket is provisional in nature. In other instances, the placing of an item may, under the circumstances, more easily give rise to the inference that there has been an intent to conceal rather than to abandon. (See, e.g., Work v. United States, 243 F.2d 660, 663(D.C. Cir.1957); State v. Chapman, 250 A.2d 203, 212(Me. 1969).)

But, more generally speaking, it must be remembered that "searches and seizures inside a home are presumptively unreasonable." (Payton v. United States, 445 U.S. at 587.) Whether or not an article of trash

is deemed to be an effect for Fourth Amendment purposes, there is a separate Fourth Amendment interest in one's own house. As this Court so eloquently declared in Alderman v. United States, 394 U.S. at 176-177:

> If the police make an unwarranted search of a house and seize tangible property belonging to third parties - even a transcript of a third-party conversation - the homeowner may object to its use against him, not because he had any interest in the seized items as "effects" protected by the Fourth Amendment, but because they were the fruits of an unauthorized search of his house, which is itself expressly protected by the Fourth Amendment. [Footnote omitted.]

Hence several cases have held that the inspection of trash containers within the curtilage may, under the circumstances, violate the Fourth Amendment in the absence of a reasonable

expectation of privacy.[25] However, when trash, whether or not within the curtilage, has been taken by the authorized trash collector (and despite any arrangement with the police to permit their inspection of it), the trash ceases to be the effect (for Fourth Amendment purposes) of its former owner.[26]

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25. These cases include: Ball v. State, 57 Wis.2d 653, 205 N.W.2d 353, 356-357(1973); State v. Chapman, 250 A.2d at 212; People v. Edwards, 71 Cal.2d 1096, 1104, 80 Cal.Rptr. 633, 458 P.2d 713, 718(1969); United States v. Long, 449 F.2d 288, 294(9th Cir.1971), cert. denied, 405 U.S. 974(1972); Work v. United States, 243 F.2d at 662. Of course, it is possible for a person to have no reasonable expectation of privacy with respect to trash placed for collection within the curtilage, depending upon the location of the trash and other circumstances. In any event, it is clear that the curtilage of Rooney's residence did not extend to the common underground garage of his apartment building. Of course, the garage is within the apartment building considered as the house which belongs to the owner and/or manager and considered as such, and who is not simply another resident occupant of the building.

26. For cases supporting this proposition, or that there is no reasonable expectation of privacy with respect to such collected trash, see, e.g., United States v. Biondich, 652 F.2d at 744-745; United States v. Crowell, 586 F.2d at 1025; United States v. Sumpter, 669 F.2d 1215, 1221(9th Cir.1982); Croker v. State,

III.

RESPONDENT RELINQUISHED WHATEVER LEGITIMATE EXPECTATION OF PRIVACY HE HAD IN HIS GARBAGE WHEN HE PLACED IT IN THE COMMUNAL TRASH BIN

Our argument as to this point can be quite brief: By abandoning his trash, Rooney relinquished whatever legitimate expectation of privacy he once had with respect to it. However, a decent respect for the opinions of mankind compels us to quickly state our reasons for also concluding that respondent relinquished whatever legitimate expectation of privacy he once had with respect to his trash by placing it in the communal trash bin, assuming arguendo that the test of abandonment is provided by the reasonable-expectation-or-privacy doctrine.

Candor compels us to concede that in some intellectually respectable sense of the term,

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477 2d at 125; State v. Stevens, 367 N.W.2d at 794-797.

"reasonable expectation of privacy" can be so used that indeed a prudent, law-abiding person may arguably be said to have a reasonable expectation of privacy with respect to garbage placed in a communal trash bin when he intends and desires, and reasonably anticipates, that police will not examine the contents of the trash container. However, this concession is not the end of our analysis but rather its beginning. This is so, it is our contention, because this Court has made it quite clear that the term "reasonable expectation of privacy" is to be understood as a technical term of art, in a sense somewhat different than that just indicated, such that a prudent, law-abiding person does not have a reasonable expectation of privacy with respect to garbage in a sealed container just because he has a well-grounded expectation that police will not examine the contents of that container.

The significance of the term "reasonable expectation of privacy" arose in Katz . In Katz this Court held that Government agents

violated the Fourth Amendment when they intercepted the contents of a telephone conversation by attaching an electronic listening devise to the outside of a public phone booth. This Court insisted that "the Fourth Amendment protects people, not places." (389 U.S. at 351.) This Court also rejected the suggestion that the concept of constitutionally protected areas "can serve as a talismanic solution to every Fourth Amendment problem." (Id. at 351 n. 9.) The Court concluded that "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." (Id. at 353.) However, this Court cautioned (id. at 35 -351, footnote omitted) that:

> [T]he Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against

> certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a persons's general right to privacy - his right to be let alone by other people - is, . . . left largely to the law of the individual states.

Justice Harlan, in his concurring opinion, expressed his understanding "that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as "reasonable." (Id. at 361.)

In Terry v. Ohio, 392 U.S. 1, 9(1968), this Court broadly stated:

> We have recently held that "the Fourth Amendment protects people, not places," Katz v. United States,

> 389 U.S. 347, 351(1967), and wherever an individual may harbor a reasonable "expectation of privacy," (id. at 361 (Mr. Justice Harlan, concurring), he is entitled to be free from unreasonable governmental intrusion.

In Rakas v. Illinois, this Court insisted that Fourth Amendment rights are personal in nature, and that the inquiry "whether the challenged search or seizure of a criminal defendant who seeks to exclude the evidence obtained during it [requires] a determination of whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect." (439 U.S. at 140.) But this Court additionally asserted the position, traced back to Katz, "that capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of

privacy in the invaded place." (Id. at 143.)

Of significance to us is the Court's following exposition in Rakas of the meaning of "legitimate expectation of privacy." This Court declared (id. at 143 n. 12):

> Obviously, however, a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. . . . And it would, of course, be merely tautological to fall back on the notion that those expectations or privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attached to property is

> the right to exclude others. . . , and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude. Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest. . . . [E]ven a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.

According to this Court in United States v. Jacobson, 466 at 122, "[t]he concept of an interest in privacy that society is prepared to recognize as reasonable is, by its very nature, critically different from the mere expectation, however well justified, that certain facts will not come to the attention of the

authorities." (Footnote omitted.) As this Court further explained in Oliver, 466 U.S. at 182-183: "The test of legitimacy [of expectation of privacy] is not whether the individual chooses to conceal assertedly 'private' activity. Rather, the correct inquiry is whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment." (Footnote omitted.) Thus the term "reasonable expectation or privacy," as used

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by this Court in connection with the Fourth Amendment, does not entail the proposition that a person, however prudent and law-abiding, has a reasonable expectation of privacy merely because he has a factually justified expectation that the police will seek out to discover information or objects desired to remain private. Additionally, the meaning of the term in question must be ultimately grounded upon the Fourth Amendment itself. As this Court noted in Oliver v. United States: "Katz 'reasonable expectation of privacy' standard did not sever Fourth Amendment doctrine from the Amendment's language." (466 U.S. at 176 n. 6.)

It is not unusual at all for legal literature to use a term which has a technical sense different from, although related to, the one or more popular senses of the term in question. Thus, for example, "[t]his Court has held that the word 'houses,' as it appears in the [Fourth] Amendment, is not to be taken literally, and that the protection of the

Amendment may extend to commercial premises." (Mancusi v. DeForte, 392 U.S. 364, 367(1968), just as it does to apartments,[27] hotel and motel rooms,[28] and rooms in rooming houses.[29] Another example is the term "open field" used in connection with the open fields doctrine. As this Court put: "An open field need be neither 'open' nor a 'field' as those terms are used in common speech. For example, . . . a thickly wooded area nonetheless may be an open field as that term is used in construing the Fourth Amendment." (Oliver, 466 U.S. at 180 n. 10.) In the popular sense of the term, there can be no doubt that the officers in the instant case searched the communal trash bin of Rooney's apartment building. On the other hand, this Court currently defines "search"

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27. E.g., Clinton v. Virginia, 377 U.S. 158(1964).

28. E.g., Stoner v. California, 376 U.S. 483(1964).

29. E.g., McDonald v. United States, 335 U.S. 451(1948).

as occurring when an expectation of privacy that society is prepared to consider reasonable is infringed. (United States v. Jacobsen, 466 U.S. at 113; Illinois v. Andreas, 463 U.S. 765, 771(1983).)

Of course, there is nothing improper for legal literature to use technical terms of art, verbally identical with popular terms which have different meanings. Such is the case, it is evident, with the term "reasonable expectation of privacy" when used by this Court on connection with Fourth Amendment issues. Hence no argument addressed to this Court can afford to ignore the fact that there has been an evolution in the meaning of the term "reasonable expectation of privacy" as used by this Court since Katz. "Reasonable" (or "legitimate") "expectation of privacy" has become, as used by this Court, a technical term of art for analysis of Fourth Amendment issues.

No one would presumably deny that, according to the Court of Appeal in its opinion in the instant case,

"a tenant who places trash in a communal trash bin possesses less of a privacy expectation than one who places trash in a privately owned trash can. . . ." (JA 86. See also: People v. Stewart (34 Cal.App.3d 695, 700, 110 Cal. Rptr. 227(1973); Ingram v. State, 703 P.2d 415, 427(Alaska Ct.App.1985), aff'd. by 719 P.2d 265(Alaska 1986).) By placing the trash within the communal trash bin, Rooney assumed the risk that his trash might be examined by fellow tenants of his apartment building or by its owner and/or manager or his agents, or by their visitors, the trash collectors, as well as by other persons entering the garage rightly characterized by the Court of Appeal as an area accessible to the public. To argue that a simple expectation that the police (unlike apartment occupants, their visitors, transients, and others) will not, in all likelihood, examine the contents of the trash bin is a legitimate expectation of privacy is to commit the error condemned by this Court in Rakas, 439 U.S. at 143 n. 12:

> And it would, of course, be merely tautological to fall back on the notion that those expectations of privacy which are legitimate depend primarily on cases deciding exclusionary-rule issues in criminal cases. Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others. . . .

Any expectation of privacy which Rooney entertained pertained to a container (i.e., the trash bin) which did not even belong, in any remote sense, to him, and which he used in common with many other persons.

Just as the occupant of a dwelling can take reasonable precautions to minimize visual surveillance by drawing the shades, curtains,

or blinds, so too a person concerned with the privacy of his trash can ordinarily minimize the hazard of discovery of matters which he desires to keep secret by shredding papers, flushing some items down the toilet, burning other items in the fireplace, or putting some in a garbage disposal unit. The person who disposes of papers by including them with his trash and putting the same out at the curb for collection has even less of a claim that he has a reasonable expectation of privacy then one who voluntarily gives his papers to another, albeit with the understanding that the contents will be kept confidential. If, as this Court has consistently maintained, "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties" (Smith v. Maryland, 442 U.S. 735, 744(1979)), he can have no legitimate expectation of privacy in papers which contain that information which are voluntarily given to third parties.

This is the case whether or not an ordinance prohibits persons other than trash collectors from rummaging in, or otherwise disturbing trash set out for collection. Such ordinances do not establish the legitimacy of expectation of privacy for Fourth Amendment purposes. They may serve several purposes: such as to protect the economic interest of the trash collectors with respect to their exclusive privilege to collect trash, or the interest in cleanliness, or sanitation, or simply to satisfy public demand that trash set out for collection not be disturbed.[30/] Indeed, placing trash in closed, opaque containers, such as plastic bags, "are obviously desinged to assure tidiness in appearance rather than privacy." (United States v. Terry, 702 F.2d

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30. See: United States v. Vahalik, 606 F.2d at 101 ("The purpose of the ordinance was, presumably, sanitation and cleanliness, not privacy."); cf. Magda v. Benson, 536 F.2d at 112-113; United States v. Dzialak, 441 F.2d at 215. Both cases summarily find such ordinances as irrelevant for Fourth Amendment purposes.

299, 309(2d Cir.1983), cert. denied, 464 U.S. 992(1983).)

If a trash can or other container supports a reasonable expectation of privacy, it cannot be lawfully searched, even on probable cause, without a warrant. (See United States v. Jacobson, 466 U.S. at 120 n. 17.) And if this is the case, the immunity of the trash container from a warrantless search survives as long as the container supports a reasonable expectation of privacy, even unto the garbage dump or the landfill. Surely, this is a reductio ad absurdum.[31/]

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31. We wonder about whether the California Supreme Court would have ruled as it did in Krivda had it realized that a warrantless search of a container supporting a reasonable expectation of privacy cannot be searched, albeit there is probable cause. Yet that court had indicated that a warrantless search, but one supported by probable cause, of a trash can set out for collection is valid under the Fourth Amendment. (See People v. Dumas, 9 Cal. 3d 871, 884, 109 Cal.Rptr. 304, 512 P.2d 1208, 1217(1973).) Nevertheless, this indication relied upon in People v. Parker, 44 Cal.App.3d 222, 229, 231, 118 Cal.Rptr. 523(1974), People v. Stewart, 34 Cal.App.3d at 700, and by the Court of Appeal in the instant case (JA 88-90).

CONCLUSION

It would surely be anomalous were this Court to find that Rooney had a Fourth Amendment interest in his discarded garbage notwithstanding the fact that the overwhelming majority of jurisdictions, which have considered the matter, have concluded that there is no Fourth Amendment interest in trash set out for collection, collected by authorized collectors, or placed in communal trash containers.[32]

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32. Magda v. Benson, 536 F.2d at 112 (trash set out for collection); United States v. Biondich, 652 F.2d at 744-745(trash collected); United States v. Crowell, 586 F.2d at 1024-1025(trash collected); United States v. Dela Espriella, 781 F.2d 1432, 1437(9th Cir. 1986)(trash set out for collection); United States v. Dzialak, 441 F.2d at 215(trash set out for collection); United States v. Kramer, 711 F.2d at 792-793(trash set out for collection); United States v. Michaels, 726 F.2d at 1312-1313(trash in communal trash container); United States v. Minker, 312 F.2d 632, 634-635 (3d Cir.1963), cert. denied, 372 U.S. 953 (1963)(trash collected); United States v. Reicherter, 647 F.2d at 399(trash set out for collection); United States v. Shelby, 573 F.2d at 793-794(trash set out for collection); United States v. Sumpter, 669 F.2d at 1221 (trash collected); United States v. Terry, 702 F.2d at 308-309(trash set out for

The Constitution, independently of the Fourth Amendment as applied to the States by the Fourteenth Amendment, does not establish any right of privacy such that it includes among its components the right that police not examine the trash set out for collection or placed in a communal trash bin in a multi-unit apartment building. (See Paul v. Davis, 424

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collection); United States v. Vahalik, 606 F.2d at 100-101(trash set out for collection). Additionally, the courts in United States v. O'Bryant, 775 F.2d 1528, 1533(11th Cir.1985), United States v. Mustone, 469 F.2d 970, 972-973(1st Cir.1972), and United States v. Thornton, 746 F.2d 39, 49 & n. 11(D.C. Cir. 1984), approvingly noted the general rule that there is no reasonable expectation of privacy as to trash discarded outside the home and its curtilage.

State cases include: Croker v. State, 477 P.2d at 123-126(trash collected); Commonwealth v. Chappee, 397 Mass. 508, 492 N.E.2d 719, 721-722(1986)(trash set out for collection); People v. Collins, 478 N.E.2d at 278-279(trash set out for collection); People v. Huddleston, 347 N.E. 2d at 78-81(trash set out for collection); Sims v. State, 425 So.2d 563, 568 (Fla.Dist. Ct.App.1982)(trash set out for collection); Smith v. State, 510 P.2d at 794-799(communal trash bin set out for collection); State v. Brown, 484 N.E.2d at 216-218(trash set out for collection); State v. Fassler, 503 P.2d at 813-814(trash set out for collection); State v. Oquist, 327 N.W.2d at 591(trash set out for collection); State v. Schultz, 388 So.2d at 1329(trash set out for collection).

U.S. 693, 712-713(1976), holding that the constitutional right of privacy, excluding Fourth Amendment interests, does not include the right that the State not publicize a record of an official act such as an arrest.)

We would be belaboring the obvious that trash set out for collection or deposited in communal trash bins can hardly be considered among those effects which the founders of the Bill of Rights intended to protect against unreasonable searches and seizures. We persist in our view, expressed in our petition for writ of certiorari, that "[w]hen garbage is placed in a trash bin, it continues to be garbage when it is taken out." (Id. at 26.) The instant case "give[s] this Court an opportunity to make it clear that the Fourth

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Amendment was adopted for more noble purposes than the protection of discarded garbage." (Id. at 27.)

Respectfully submitted,

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By

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APPENDIX

Pertinent California statutory provisions include:

Penal Code Section 337a provides in part:

> Every person
>
> 1. Who engages in pool selling or bookmaking, with or without writing, at any time or place; or
>
> 2. Who, whether for gain, hire, reward, or gratuitously, or otherwise, keeps or occupies, for any period of time whatsoever, any room, shed, tenement, tent, booth, building, float, vessel, place, stand or enclosure, of any kind, or any part thereof, with a book or books, paper or papers, apparatus, device or paraphernalia, for the purpose of recording or registering any bet or bets, or any purported bet or bets, or wager or wagers, of any any purported wager or wagers, or of selling pools, or purported pools, upon the result, or purported

result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beat, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

* * * * *

4. Who, whether for gain, hire, reward, or gratuitously, or otherwise, at any time or place, records, or registers any bet or bets, wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus, or upon the result, or purported result, of any lot, chance, casualty, unknown or contingent event whatsoever; or

5. Who, being the owner, lessee or occupant of any room, shed, tenement, tent, booth, building, float, vessel, place, stand, enclosure or grounds, or any part thereof, whether for gain, hire, reward, or gratuitously, or otherwise, permits the same to be used or occupied for any purpose, or in any manner prohibited by subdivision 1, 2, 3 or 4 of this section; or

6. Who lays, makes, offers or accepts any bet or bets, or wager or wagers, upon the result, or purported result, of any trial, or purported trial, or contest, or purported contest, of skill, speed or power of endurance of man or beast, or between men, beasts, or mechanical apparatus,

is punishable by imprisonment in the county jail for a period of not more than one year or in the state prison.

* * * * *

Penal Code Section 871.5 provides in part:

(a) When an action is dismissed by a magistrate pursuant to Section 859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389, or a portion thereof is dismissed pursuant to those same sections which may not be charged by information under the provisions of Section 739, the prosecutor may make a motion in the superior court within 15 days to compel the magistrate to reinstate the complaint or a portion thereof and to reinstate the custodial status of the defendant under the same terms and conditions as when the defendant last appeared before the magistrate.

(b) Notice of the motion shall be made to the defendant and the magistrate. The only ground for the motion shall be that, as a matter of law, the magistrate erroneously dismissed the action or a portion thereof.

(c) The superior court shall hear and

determine the motion on the basis of the record of the proceedings before the magistrate. If the motion is litigated to decision by the prosecutor, the prosecution is prohibited from refiling the dismissed action, or portion thereof.

* * * * *

(e) When a court has ordered the resumption of proceedings before the magistrate, the magistrate shall resume the proceedings and when so ordered, issue an order of commitment for the reinstated offense or offenses within 10 days the superior court has entered an order to that effect or within 10 days after the remittitur is filed in the superior court. Upon receipt of the remittitur, the superior court shall forward a copy to the magistrate.

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(g) * * * * *

If the superior court grants the motion for reinstatement and orders the magistrate to issue an order of commitment, the defendant, in lieu of resumed proceedings before the

magistrate, may elect to waive his or her right to be committed by a magistrate, and consent to the filing of an amended or initial information containing the reinstated charge or charges. After arraignment thereon, he or she may adopt as a motion pursuant to Section 995, the record and proceedings of the motion taken pursuant to this section and the order issued pursuant thereto, and may seek review of the order in the manner prescribed in Section 999a.

Penal Code Section 1238 provides in part:

(a) An appeal may be taken by the people from any of the following:

* * * * *

(7) An order dismissing a case prior to trial made upon motion of the court pursuant to Section 1385 whenever such order is based upon an order granting defendant's motion to return or suppress property or evidence made at a special hearing as provided in this code.

Penal Code Section 1385 provides:

The judge or magistrate may, either of its own motion or upon the application of the

prosecuting attorney, and in furthereance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

Penal Code Section 1538.5 provides in part:

(a) Grounds. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.

(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state

constitutional standards.

(b) First hearing. When consistent with the procedures set forth in this section and subject to the provisions of Section 170 through 170.6 of the Code of Civil Procedure, the motion should first be heard by the magistrate who issued the search warrant if there is a warrant.

(c) Evidence. Whenever a search or seizure motion is made in the municipal, justice or superior court as provided in this section, the judge or magistrate shall receive evidence on any issue of fact necessary to determine the motion.

(d) Effect of granting motion. If a search or seizure motion is granted pursuant to the proceedings authorized by this section, the property or evidence shall not be admissible against the movant at any trial or other hearing unless further proceedings authorized by this section, Section 871.5, Section 1238, or Section 1466 are utilized by the people.

(e) Return of property. If a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention. If the motion is granted at a special hearing, the property shall be returned upon order of the court only if, after the conclusion of any further proceedings authorized by this section or Section 1238 or Section 1466, the property is not subject to lawful detention or if the time for initiating such proceedings has expired, whichever occurs last. If the motion is granted at a preliminary hearing, the property shall be returned upon order of court after 10 days unless the property is otherwise subject to lawful detention or unless, within that time, further proceedings authorized by this section, Section 871.5, or Section 1238 are utilized; if they are utilized, the property shall be returned only if, after the conclusion of such proceedings, the property is no longer subject to lawful detention.

(f) Felony; motion upon filing information in superior court or at preliminary hearing in municipal or justice court. If the property or evidence relates to a felony offense initiated by a complaint, the motion shall be made in the superior court only upon filing of an information, except that the defendant may make the motion at the preliminary hearing in the municipal or justice court but the motion in the municipal or justice court shall be restricted to evidence sought to be introduced by the people at the preliminary hearing.

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(i) Felony; renewal of motion at a special hearng; review. If the property or evidence obtained relates to a felony offense initiated by complaint and the defendant was held to answer at the preliminary hearing, or if the property or evidence relates to a felony offense initiated by indictment, the defendant shall have the right to renew or make the motion in the superior court at a special hearing relating to the validity of the search or

seizure which shall be heard prior to trial and at least 10 days after notice to the people unless the people are willing to waive a portion of this time. The defendant shall have the right to litigate the validity of a search or seizure de novo on the basis of the evidence presented at a special hearing. After the special hearing is held in the superior court, any review thereafter desired by the defendant prior to trial shall be by means of an extraordinary writ of mandate or prohibition filed within 30 days after the denial of his motion at the special hearing.

j) Relitigation of question after grant of motion; new evidence; review. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return of the property or suppression of the evidence at the preliminary hearing is granted, and if the defendant is not held to answer at the preliminary hearing, the people may file a new complaint or seek an indictment after the preliminary hearing, and

the ruling at the prior hearing shall not be binding in any subsequent proceeding. In the alternative, the people may move to reinstate the complaint, or those parts of the complaint for which the defendant was not held to answer, pursuant to Section 871.5. If the property or evidence relates to a felony offense initiated by complaint and the defendant's motion for the return or suppression of the property or evidence at the preliminary hearing is granted, and if the defendant is held to answer at the preliminary hearing, the ruling at the preliminary hearing shall be binding upon the people unless, upon notice to the defendant and the court in which the preliminary hearing was held and upon the filing of an information, the people within 15 days after the preliminary hearing request in the superior court a special hearing, in which case the validity of the search or seizure shall be relitigated de novo on the basis of the evidence presented at the speical hearing, and the defendant shall be entitled, as a matter of right, to a continuance of the special

hearing for a period of time up to 30 days. If defendant's motion is granted at a special hearing in the superior court, the people, if they have additional evidence relating to the motion and not presented at the special hearing, shall have the right to show good cause at the trial why such evidence was not presented at the special hearing and why the prior ruling at the special hearing should not be binding, or the people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385. If the property or evidence seized relates solely to a misdemeanor complaint, and the defendant made a motion for the return of property or the suppression of evidence in the municipal court or justice court prior to trial, both the people and defendant shall have the right to appeal any decision of that court relating to that motion to the superior court of the county in which such inferior court is located, in accordance with the California Rules of Court

provisions governing appeals from municipal and justice courts in criminal cases. If the people prosecute review by appeal or writ to decision, or any review thereof, in a felony or misdemeanor case, it shall be binding upon them.

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(m) Exclusive pre-trial remedy; review on appeal after conviction. The proceedings provided for in this section, Section 871.5, Section 995, Section 1238, and Section 1466 shall constitute the sole and exclusive remedies prior to conviction to test the unreasonableness of a search or seizure where the person making the motion for the return of property or the suppression of evidence is a defendant in a criminal case and the property or thing has been offered or will be offered as evidence against him. A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a

plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.

(n) Motions on other grounds; existing law and procedure. Nothing contained in this section shall prohibit a person from making a motion, otherwise permitted by law, to return property, brought on the ground that the property obtained is protected by the free speech and press provisions of the Federal and State Constitutions. Nothing in this section shall be construed as altering (i) the law of standing to raise the issue of an unreasonable search or seizure; (ii) the law relating to the status of the person conducting the search or seizure; (iii) the law relating to the burden of proof regarding the search or seizure; (i) the law relating to the reasonableness of a search or seizure regardless of any warrant which may have been utilized; or (v) the procedure and law relating to a motion made pursuant to

Section 871.5 or 995 or the procedures which may be initiated after the granting or denial of such a motion.

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